

**106th Session**

**Judgment No. 2770**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Ms D. D., Ms M.-N. L., Ms E. M. and Ms M.A. P. against the World Intellectual Property Organization (WIPO) on 27 August 2007 and corrected on 3 September, the Organization's reply of 17 December 2007, the complainants' rejoinder of 16 January 2008, WIPO's surrejoinder of 22 April, the complainants' additional submissions of 24 July and WIPO's final observations of 3 October 2008;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. According to WIPO Staff Rule 3.4.2(3), a step on promotion in the Professional category shall be the lowest in the new grade which will provide an increase in salary at least equal to that which would have resulted from the granting of two steps in the old grade. Where, owing to the overlap between the General Service and Professional

category salary scales, the application of that formula would not suffice to prevent a staff member from incurring a reduction in salary on promotion – which is often the case for staff members promoted from a high grade in the General Service category to a low grade in the Professional category – the Organization pays a personal transitional allowance in order to bring the new salary to the level prescribed by Staff Rule 3.4.2(3). For staff members receiving this allowance, subsequent increases in the Professional category salary scale do not result in an increase in net salary; instead, their personal transitional allowance is reduced by the corresponding amount until such time as the salary pertaining to their new grade and step has reached the level that the allowance served to maintain.

A similar mechanism serves to protect the level of the promoted staff member's pensionable remuneration, which is calculated in Swiss francs for General Service staff and in United States dollars for Professional category staff. Thus, Staff Rule 3.15(c) provides that, "[w]here promotion of a staff member from the General Service category to the Professional category results in a reduction of his pensionable remuneration, the staff member concerned shall continue to benefit from the said remuneration at the level it had reached immediately prior to promotion until such time as, for any reason, the pensionable remuneration corresponding to his salary in the Professional category exceeds the aforementioned level".

The first complainant, Ms D., is a French national born in 1951. She joined WIPO in 1972 at grade G3, and on 1 July 2001 she was promoted from grade G7 step 10 to grade P-2 step 12. In a memorandum of 2 November 2004 initialled by her supervisor, she asked the Director of the Human Resources Management Department to be granted a personal promotion to grade P-3 because her salary and pensionable remuneration were then lower than those that would have accrued to her had she remained at grade G7. She reiterated her request on 18 May 2005 and on 4 April 2006. By a memorandum of 9 May 2006 to the Deputy Director of the Human Resources

Management Department, her supervisor asked that her request for promotion be examined at the next session of the Promotion Advisory Board. When it met in June 2006, the Board recommended that its examination of the request be adjourned to its next session.

The second complainant, Ms L., is also a French national born in 1951. She joined the Organization in 1979 at grade G2 and on 1 June 2002 was promoted from grade G7 step 10 to grade P-2 step 12. On 18 August 2005 she asked that her post be upgraded from P-2 to P-3 on the grounds that she had assumed new responsibilities. Her supervisors subsequently wrote to the Director of the Human Resources Management Department in support of her request, explaining that she had not received any financial benefits from her promotion to grade P-2.

The third complainant, Ms M., is a Dutch national born in 1952. She joined WIPO in 1994 at grade G5 and was promoted from grade G7 step 10 to grade P-2 step 12, effective 1 December 2002. In a memorandum of 1 June 2005 addressed to the Director General and copied to the Director of the Human Resources Management Department, she pointed out that her promotion had entailed a reduction in her pensionable remuneration and that she had not been promoted to grade P-3 after two years at grade P-2 as she had hoped. She appended an estimate of the pension entitlements that would have accrued to her as from 1 July 2005 had she remained at grade G7. On 28 November 2005 she sent a new estimate of her pension entitlements to the Director of the Human Resources Management Department.

The fourth complainant, Ms P., is a British national born in 1952 who joined WIPO in 1990 at grade G5. In a memorandum to the Director of the Human Resources Management Department dated 16 April 2003, her supervisor recommended her promotion to grade P-2 or, on an exceptional basis, to grade P-3. She was promoted from grade G7 step 9 to grade P-2 step 12 with effect from 1 December 2003. On 11 October 2004 and 10 May 2006 her

supervisor wrote to the Director General and to the Deputy Director of the Human Resources Management Department respectively, and recommended her promotion to grade P-3 in consideration of the responsibilities she assumed and the financial loss she had suffered due to her promotion to grade P-2. In June 2006 the complainant was informed that the Promotion Advisory Board had not examined her case at its last session since she did not meet the minimum in-grade seniority requirement. Her supervisor again wrote to the Director of the Human Resources Management Department on 28 July 2006 to express her disappointment, noting in particular that “in 2003, indication was given by [the Human Resources Management Department] that, in line with practice at that time [Ms P.] would receive her P-3 approximately a year later”. By a memorandum of 28 November 2006 the Deputy Director of the Human Resources Management Department advised the complainant’s supervisor that her recommendation for promotion would be considered by the Promotion Advisory Board at its next session.

On 15 August 2006 the four complainants sent a memorandum to the Director General, in which they pointed out that their promotion from grade G7 to grade P-2 had resulted in the loss of step increase as well as a reduction of their pension entitlements. They also pointed out that the annual salary adjustments based on the evolution of the cost of living which applied to staff in the Professional category had been deducted from the personal transitional allowance that they received. Contrary to their expectations, they had not been promoted to grade P-3 within one to two years of the date of their promotion to grade P-2, in accordance with WIPO’s practice. They therefore asked to be granted immediate promotion to grade P-3 with retroactive effect from one year after their promotion to grade P-2; they also requested an increase in salary of at least two steps in their new grade as well as the reimbursement of the amounts incorrectly deducted from their personal transitional allowance. The Director of the Human Resources Management Department replied jointly to the complainants on 15 November 2006. He proposed that all four complainants revert to grade G7. As an alternative for three of the complainants, he also

proposed that the promotion of Ms D., Ms L. and Ms P. be considered at the next session of the Promotion Advisory Board.

In the meantime, on 6 November 2006, the complainants submitted separate appeals. In its reports of 22 January 2007 the Appeal Board recommended that the Director General consider promoting Ms D. and Ms L. to grade P-3 with retroactive effect from 2006 or earlier, and that Ms P. be promoted to grade P-3 with effect from 1 June 2005 “or at the earliest possibility” thereafter. It also recommended that the Director General consider promoting Ms M. “if applicable”, or that she revert to grade G7 step 11 with all allowances and privileges she would have received had she remained at that grade.

By letters dated 29 May 2007, which constitute the impugned decisions, the complainants were informed that the Director General had decided to convene an extraordinary session of the Promotion Advisory Board, which would consider the promotion of Ms D., Ms L. and Ms P. to grade P-3. As for Ms M., it was proposed that her case be considered at the next session of the Promotion Advisory Board or, alternatively, that she exceptionally revert to grade G7.

On 4 June 2007 the Director of the Human Resources Management Department informed the four complainants that, following the recommendations of the Promotion Advisory Board, it had been decided to offer them a promotion on merit to grade P-3 with effect from 1 June 2007. In a joint letter to the Director General dated 25 June 2007, the complainants accepted the offers but asked him to reconsider the retroactivity of their promotion to grade P-3 as recommended by the Appeal Board, and to correct the reduction to their pension entitlements as well as the deductions from their personal transitional allowance. They were informed individually by letters dated 20 July 2007 that the Director General had decided to maintain the effective date of their promotion at 1 June 2007 and deny their claim for correction. With regard to the former, it was noted in particular that the Appeal Board had not been unanimous as to the retroactive effect of the promotions of Ms D. and Ms L. and that on 1 June 2005 Ms P. did not meet the minimum in-grade seniority

requirement set out in the Guidelines on the Promotion of Staff promulgated in Office Instruction No. 8/2006. It was also noted that there was no requirement under the Staff Regulations and Staff Rules to make the complainants' promotion retroactive and that the Appeal Board had made no recommendation as to the retroactive effect of Ms M.'s promotion.

B. The complainants submit that the decisions not to correct the deductions from their personal transitional allowance are contrary to the nature and object of a promotion, which, according to the Tribunal's case law, entails an increase in salary. They contend that the Organization's interpretation of WIPO Staff Rule 3.4.2(3) is erroneous. No provision allows the Organization to withhold annual salary adjustments based on the evolution of the cost-of-living or periodic adjustments based on place-to-place surveys, and United Nations Staff Rule 103.9, on which the Administration relies, does not apply to WIPO. The complainants claim that they suffered a reduction in their pensionable remuneration due to the fluctuations of the exchange rate between the Swiss franc and the United States dollar. They also contend that the methodology adopted by the Organization to calculate the personal transitional allowances was unpublished; it was therefore applied in breach of due process. Insofar as they were deprived of the salary adjustments accrued to "ordinary" staff members in the General Service and Professional categories, the methodology also infringed the principle of equal treatment and the obligation to maintain contractual balance and acquired rights. The application of this methodology combined with the failure to promote the complainants to grade P-3 soon after their promotion to grade P-2, amounts to a violation of Staff Regulation 4.3(a), which defines promotion as "the advancement of a staff member to a post of higher grade".

The complainants assert that it has been the practice of the Organization not to maintain a staff member promoted from the General Service category to the Professional category at grade P-2 for longer than one or two years. Additionally, one of them, Ms P.,

received the promise that she would be promoted to grade P-3 within a short period of time after she was promoted to grade P-2.

The complainants also submit that the decisions to deny retroactive effect to their promotion to grade P-3 are flawed since the internal appeal proceedings breached their rights to due process and to a fair hearing. They allege that by relying on the reports of the Appeal Board, the Director General committed errors of law and drew manifestly wrong conclusions from the facts. Office Instruction No. 8/2006, which superseded Office Instruction No. 12/1998, is a mere guideline and the seniority requirement is only indicative. Moreover, the fact that one of the members of the Appeal Board disagreed on the question of retroactivity was not a sufficient basis for the Director General to refuse a retroactive effect to the promotion of Ms D. and Ms L. In considering that there was no requirement under the Staff Regulations and Staff Rules to make the complainants' promotion retroactive, the Director General failed to exercise his discretion.

The complainants ask the Tribunal to join their complaints. By way of relief, they ask the Tribunal to rescind the decisions to deny a correction of the deductions from their personal transitional allowance from the time of their promotion to grade P-2 and until their promotion to grade P-3 and to order the Director General to recalculate their salary as from the date when they first requested correction and grant them a new step in grade P-3, so that they will be entitled to a higher pensionable remuneration. In addition, they request that the Tribunal rescind the Director General's decisions to deny retroactive effect to their promotion to grade P-3 and refer the issue back to him for a new decision. They claim 50,000 Swiss francs each in moral damages for the prejudice they have suffered as a consequence of the Administration's delay in considering their promotion as well as its "failures". They emphasise in this respect that the work of the Promotion Advisory Board was interrupted in 2004, 2005 and 2006, and that the Classification Committee did not meet between 2001 and 2006. They also claim costs in the amount of 20,000 francs each.

C. In its reply WIPO argues that the methodology it adopted for calculating the complainants' personal transitional allowance was consistent with a practice stemming from the "transitional arrangements" agreed upon by Geneva-based agencies and eventually codified in Annex III of WIPO Staff Regulations and Staff Rules. Its application was relevantly guided by United Nations Staff Rule 103.9 as well as the practice within the United Nations common system. In line with WIPO Staff Rule 3.4.2(3), the allowance ensured that the promoted staff members received an increase in salary at the time of their promotion and until such time as the salary pertaining to their new grade and step reached the level of the salary they would have received in the grade and step they held before promotion. Furthermore, the complainants were aware of the reduction in financial gains before they accepted their promotion to grade P-2 and they did not suffer any loss in comparison to P-2 staff members who were not promoted from the General Service category.

The Organization submits that the complainants have failed to establish the existence of a practice whereby promotions to grade P-3 are granted within one or two years after a promotion to grade P-2. On the contrary, the material it adduced on appeal shows that promotions from grade P-2 to grade P-3 until December 2006 varied in length of time. Likewise, they have failed to demonstrate that a promise to promote Ms P. to grade P-3 was made by the competent authority. It notes in this respect that, as per Office Instruction No. 32/2002, "[a]ny commitment related to [...] a change of contractual status of a staff member [...] made by a Program Manager or a supervisor independently of [the Human Resources Management Department] will be considered entirely his/her responsibility".

The defendant contends that the complainants' rights to due process and to a fair hearing were respected. Relying on the case law, it asserts that it had no obligation to promote the complainants to grade P-3, much less to do so in a "specific timeline" since a promotion is a matter within the discretion of the appointing authority. In the present case, the Director General duly exercised his discretion in promoting the complainants with effect from 1 June 2007. Referring to the

Guidelines on the Promotion of Staff contained in Office Instruction No. 8/2006, WIPO argues that they proscribe promotions with retroactive effect and identify in-grade seniority as only one of the requirements for promotions.

With regard to the relief sought by the complainants, the Organization notes that, should the Tribunal decide to order their retroactive promotion to grade P-3, the request to correct their personal transitional allowance would become moot. It denies any inordinate delay in promoting the complainants to grade P-3 or any “failures” on the part of the Administration. It points out that the complainants’ pensionable remuneration was protected in accordance with Staff Regulation 3.15(c) and that, according to the case law, they had no acquired right to have their pensionable remuneration protected from the effect of the fluctuations of the exchange rate.

D. In their rejoinder the complainants press their pleas. They submit that they did not know how the personal transitional allowance would be calculated before they accepted their promotion to grade P-2 and that other staff members were promoted from grade P-2 to grade P-3 with an average “waiting period” of 21 months. In their opinion, Office Instruction No. 8/2006 does not prevent the Director General from granting promotions with retroactive effect. They also argue that they did not make any claim with respect to their pension entitlements but only asked that the issue of the retroactivity of their promotion to grade P-3 be referred back to the Director General.

E. In its surrejoinder WIPO maintains its position. It stresses that the Staff Regulations and Staff Rules make no reference to a possible retroactive effect of promotions, whereas Office Instruction No. 8/2006 provides that decisions come into force with prospective and not retroactive effect.

F. In their additional submissions the complainants draw attention to the fact that eight staff members were granted promotion in May and June 2008 with retroactive effect from October 2007. This, they submit, demonstrates that Office Instruction No. 8/2006 does

not prevent the Director General from granting promotions with retroactive effect.

G. In its final observations the Organization explains that unlike the complainants, who were granted promotion based on merit, the eight staff members were granted promotion based on reclassification.

## CONSIDERATIONS

1. All four complainants were promoted from the General Service category, grade G7, to the Professional category, grade P-2, after several years of employment with WIPO or other United Nations agencies and intergovernmental organisations. Their promotions to the Professional category took effect on various dates between 2001 and 2003. They each remained at grade P-2 until they were promoted to grade P-3 with effect from 1 June 2007. Those promotions followed internal appeals in which the Appeal Board recommended, by a majority, that the Director General consider promoting the first, second and fourth complainants to grade P-3 with retroactive effect from various specified dates and, in the case of the third complainant, that he consider promoting her in accordance with the applicable provisions and procedures and, if that were not possible, that she revert to grade G7 with all allowances and privileges she would have received had she remained at grade G7, step 11. The four complainants challenge the promotion decisions to the extent that they were not retroactive and did not provide a means for adjusting their salary for the losses they claim to have suffered as a result of their promotion. It is common ground that the complaints are receivable.

2. The complainants apply for joinder and the Organization does not object. The four complaints raise the same issues of fact and law and seek the same redress; they are therefore joined to form the subject of a single judgment.

3. The arguments advanced by the complainants revolve around the overlap between the salary scales for the General Service and the

Professional categories. In the case of each complainant, the salary for her grade and step in the General Service category was higher than for her P-2 grade in the Professional category. Because of the overlap in the salary scales, WIPO has a practice of topping up the salaries of those promoted from the higher grades in the General Service category to lower grades in the Professional category with a personal transitional allowance. The allowance results in their receiving the same salary as they would have received in the grade and step they held before promotion together with a two-step increase. This is known as “the protected salary”. However, subsequent increases to salaries in the Professional category are absorbed in the personal transitional allowance, which is correspondingly reduced until the salary in the new grade is equal to the protected salary.

4. Notwithstanding the personal transitional allowance, a promotion from the General Service category to the Professional category may result in those so promoted becoming worse off financially in respect of actual salaries and pensionable remuneration than they would have been had they not been promoted. The complainants contend that because of this there has been a practice in WIPO to promote to grade P-3 long-serving staff members who have been promoted from the General Service category within one or two years of their promotion to grade P-2. The fourth complainant also contends that she was expressly promised a promotion to grade P-3. They, thus, seek to have the matters referred back to the Director General for reconsideration of the effective dates of their promotion to grade P-3. Each complainant also seeks to have her personal transitional allowance corrected, presumably by restoration of the amounts by which it was reduced to absorb increases in the Professional category salary scale as well as moral damages and costs.

5. Before turning to the arguments, it is convenient to note the differences between the complainants’ actual salary after their promotion to grade P-2 and those they would have received had they remained in the General Service category up until their promotion to grade P-3. As calculated by WIPO, those differences are as follows:

<u>Year</u>	<u>Swiss francs</u>
<u>First complainant</u>	
2001	+429.90
2002	+156.35
2003	+124.20
2004	+130.50
2005	-168.50
2006	-243.70
2007	-236.50
<u>Second complainant</u>	
2002	+571.75
2003	+542.20
2004	+337.65
2005	+ 35.95
2006	- 42.05
2007	- 34.85
<u>Third complainant</u>	
2002	+210.15
2003	+ 15.60
2004	+ 20.90
2005	-277.10
2006	-352.35
2007	-345.15
<u>Fourth complainant</u>	
2003	+481.15
2004	+323.70
2005	-156.95
2006	-229.95
2007	-222.75

In the case of the first, second and fourth complainants, their promotion to grade P-2 brought about a situation in which they were

then better off than if they had stayed in the General Service category. The third complainant was not, but only by a small amount, and her situation changed in 2008.

6. It is convenient also to refer to the complainants' contentions with respect to their pensionable remuneration. In this regard, they point out that, on promotion, their pensionable remuneration was expressed in United States dollars, whereas for the General Service category it is expressed in Swiss francs. They also point out that the disadvantage that they have suffered in relation to their salary is reflected in their pensionable remuneration. It should at once be noted that the question whether the complainants will be actually disadvantaged in relation to their pension can only be determined at the point of separation (see Judgment 2629). Moreover, and so far as they may be disadvantaged by the fluctuations of the exchange rate between the dollar and the franc, that is a matter beyond the control of WIPO. Further, WIPO Staff Regulation 3.15(c) specifically provides:

“Where promotion of a staff member from the General Service category to the Professional category results in a reduction of his pensionable remuneration, the staff member concerned shall continue to benefit from the said remuneration at the level it had reached immediately prior to promotion until such time as, for any reason, the pensionable remuneration corresponding to his salary in the Professional category exceeds the aforementioned level.”

The effect of that provision is that there is only limited protection of pensionable remuneration and, as pointed out in Judgment 1171 in relation to a similar provision, a staff member “may not properly object if [...] his pensionable remuneration has not increased, because he was appointed to P.2 at the highest step and has not received any advancement or further promotion since then”.

7. WIPO denies that there is or was a practice of accelerated promotion to grade P-3 for long-serving staff members promoted from the General Service category. In this respect, it relies on material it provided to the Appeal Board showing that, for the ten years to 2006, the period of promotion from grade P-2 to grade P-3 varied from slightly less than one year to nearly 5.9 years. However, of the

39 persons promoted to grade P-3, 33 were promoted in under four years, 23 were promoted in under three years and 11 within two years. In addition, the information did not indicate which of those staff members had been long-serving staff members in the General Service category.

8. In its reports dealing with the complainants' internal appeals, the Appeal Board could not confirm that there was a practice of accelerated promotion from grade P-2 to grade P-3 for long-serving staff members promoted from the General Service category. However, it stated that it "certainly was convinced that there were instances of staff members promoted before the stipulated three years seniority" and added that it was "familiar also with some cases that did not even necessitate going through the standard promotion procedure".

9. Whether or not there was a practice of promoting long-serving staff members from grade P-2 to grade P-3 within one or two years of their promotion from the General Service category, as claimed by the complainants, it is inconceivable that long-serving staff members would accept promotion from the General Service category to the Professional category unless there were some practice that minimised the risk of financial disadvantage. Moreover, and as will later appear in relation to the endeavours to secure a promotion for the fourth complainant, there is evidence that there was some such practice. Further, the fact that of the 42 persons promoted from the General Service category to the Professional category within the ten years prior to 2006, 23 were further promoted to P-3 within three years, suggests that there was a practice of at least considering the question of promotion before the staff member's salary fell below what it would have been had he or she remained in the General Service category.

10. It should also be noted that the Guidelines on Promotion of Staff which were first promulgated in Office Instruction No. 12/1998 made specific provision for accelerated promotion in these terms:

“A staff member who has performed his/her duties in an outstanding manner, who has demonstrated high career potential and, as a result, has had various assignments in the present grade or performed duties at a higher level than the grade of his/her post, may exceptionally be considered for an *accelerated promotion*, but normally not earlier than one year before completion of the minimum in-grade period [...]”

No equivalent provision is to be found in the Guidelines on the Promotion of Staff promulgated in Office Instruction No. 8/2006. Until then, however, the provision with respect to accelerated promotion provided a basis for a practice of at least considering the accelerated promotion of persons promoted from the General Service category.

11. The salary figures relating to the complainants indicate that two of them suffered a salary disadvantage after four years and the other two after three and two years respectively. There is no reason to suppose that the pattern would be significantly different in the case of others promoted from the General Service category. In these circumstances, and given that WIPO has not offered any explanation for the accelerated promotions indicated by its own figures, it is reasonable to infer that there was a practice of at least considering the promotion to grade P-3 of long-serving staff members promoted from the General Service category to the Professional category some time before their salary became less than it would have been if they had not been promoted. For reasons that will appear later, it is not necessary to consider whether that practice has survived in the case of persons promoted after the Guidelines were reissued in Office Instruction No. 8/2006.

12. In addition, a practice of considering accelerated promotion before staff members suffer a salary disadvantage is consistent with the duty of good faith. In this regard, ordinary considerations of good faith require that an international organisation ensure that a person is not disadvantaged by promotion. Thus in Judgment 460, a case where promotion resulted in an increase in basic salary but a reduction in net salary because of the cancellation of a special duty allowance, the Tribunal held:

“This anomaly is unacceptable. It is quite unfair to reduce remuneration when responsibility is increased.”

The same principle holds good whether the reduction is immediate or, as here, occurs with the passage of time.

13. Before turning to the reasons given by the Director General for his decision neither to grant retroactive effect to the complainants’ promotion nor to correct their personal transitional allowance, it is appropriate to note the actions taken by them to secure promotion to grade P-3.

The first complainant requested a personal promotion to grade P-3 on 2 November 2004. Her request was supported by her supervisor. She sent reminders on 18 May 2005 and on 4 April 2006, and her supervisor forwarded a formal recommendation on 9 May 2006. Her case was then submitted to the Promotion Advisory Board which, in June 2006, recommended that her case be considered at its next session.

The second complainant sought reclassification of her post on 18 August 2005. Her supervisors supported her request on 1 February 2006 and, again, on 5 July 2006. It seems that, although there was then an ongoing classification and promotion on merit exercise, her case was not considered.

The third complainant sought assistance with respect to her situation from the Human Resources Management Department on 1 June 2005. She met with the Director and Deputy Director of the Department in October 2005 but heard nothing further.

The fourth complainant’s supervisor requested her promotion to grade P-3 in October 2004 and she was informed that her recommendation would be forwarded to the Promotion Advisory Board for consideration at its next session. In the meantime, she reported that the complainant’s post should be immediately reclassified and pointed out that in April 2003 she had been appointed to grade P-2 on the understanding that she would be promoted to grade P-3 a year later “in accordance with the custom”. In June 2006 the Promotion Advisory Board reported that it had not reviewed the complainant’s

case, as she did not have “the minimum in-grade requirement”. Her supervisor protested that course, stating that, in 2003 the Human Resources Management Department had indicated that she would receive grade P-3 approximately a year later. She concluded by saying that, in her view, promotions requested before the Guidelines on the Promotion of Staff were reissued in 2006 should be given special consideration because of the difference between them and “the practice prevalent at the time the request for promotion was originally made”.

14. On 15 August 2006 the four complainants made a joint request to the Director General for immediate promotion to grade P-3 with retroactive effect from one year after their promotion to grade P-2 and for correction of their personal transitional allowances. Having received no reply, they submitted separate internal appeals on 6 November 2006. The Appeal Board issued its reports on 22 January 2007. On 29 May they were informed that the Director General had decided to refer the cases of the first, second and fourth complainants to an extraordinary session of the Promotion Advisory Board and that, subject to a recommendation from her supervisor, the third complainant’s case would be referred for consideration at its next session, but that she could revert to grade G7 if she so wished.

15. The Promotion Advisory Board met on 31 May 2007 and considered all four cases. However, it did not consider the question of retroactive effect as that was beyond its competence. The complainants took up that issue with the Director General. They were informed on 20 July that their claim for retroactive effect had been refused by the Director General. The claim of the first, second and fourth complainants was refused on the grounds that there was no requirement under the Staff Regulations and Staff Rules for their promotion to be retroactive; that promotion decisions were normally prospective and not retroactive; that there had been no retroactive promotions since the Guidelines on the Promotion of Staff were reissued in 2006; and that the non-retroactive nature of the promotions was consistent with the Organization’s practice.

It was also noted that the Appeal Board had not been unanimous as to the retroactive effect of the promotion of the first and second complainants and that it had made no recommendation as to the retroactive effect of the third complainant's promotion. No reason was given for refusing to correct their personal transitional allowance.

16. There is evidence of retroactive effect being given to promotion decisions in 2004 and, thus, it is not clear either that promotion decisions were normally prospective or that the decisions to refuse retroactive effect in the present cases were consistent with the Organization's practice. However, it is clear that the Director General has a discretion to decide whether or not to give retroactive effect to the complainants' promotion. In this regard, the provision in the Guidelines on the Promotion of Staff reissued in 2006 that "[t]he implementation [of promotions] can in no case be made with retroactive effect" must be construed as a direction to the Promotion Advisory Board and not as derogating from the "general rule [...] that promotion is at the [Director] General's discretion" (see Judgment 1025). Further, the complainants have produced evidence in which the Director General has given retroactive effect to promotions, notwithstanding the Guidelines contained in Office Instruction No. 8/2006, albeit that the promotions concerned were the result of reclassification rather than promotion on merit. That difference is not significant. Considerations of fairness and justice apply to merit promotions as well as to promotions resulting from reclassification.

17. The decisions not to give retroactive effect to the complainants' promotion, being discretionary, are subject to review on limited grounds. Those grounds include "disregard of an essential fact, a mistaken deduction from the evidence [and] a mistake of fact or law" (see Judgment 1137). The Director General proceeded on the basis that there was not and had not at any relevant time been a practice of considering the accelerated promotion to grade P-3 of long-serving staff members promoted from the General Service category. That was a mistake of fact. Moreover, it occasioned both an error of law and a disregard of an essential fact. In the first place, it resulted in the failure to consider that, given the practice of considering accelerated

promotion before persons promoted from the General Service category became financially disadvantaged, it was reasonable to infer that those persons promoted before the Guidelines were reissued in 2006 had acted in reliance on that practice. That being so and given that the failure to observe the practice could and, in the present cases, did result in disadvantage, ordinary principles of good faith and estoppel obliged the Organization to observe that practice in relation to them, even though new Guidelines were issued in 2006. Accordingly, the Director General overlooked the essential fact that the complainants had acted on the basis that the practice would be observed and committed an error of law in failing to recognise that the Organization had an obligation to observe the practice and that the failure to do so required remedial action. In addition, he committed a further error of law in failing to take into consideration that, if the complainants would have been promoted in accordance with the practice identified, the only possible remedial action was to give retroactive effect to their promotion, because this is the only course that can overcome the disadvantages associated with pensionable remuneration. It follows that the decisions not to grant retroactive effect must be set aside.

18. It should also be noted that there was an additional error in relation to the fourth complainant. The evidence from her supervisor was that there was an undertaking from the Human Resources Management Department in April 2003 that she would be promoted one year later and that should have been taken into account. The Organization's argument that it is not bound by representations from "Program Managers or supervisors" is irrelevant.

19. The complainants' claim for correction of their personal transitional allowance must be rejected. The deduction of increases to grade P-2 salaries is an integral part of the policy and practice adopted by WIPO to ensure that promotion from the General Service category to the Professional category results in increased remuneration. If, in a particular case, the personal transitional allowance does not result in a staff member receiving a higher salary than he or she would have received if not promoted, the proper course is for action of the kind

directed by the Tribunal in Judgment 460, namely, the making of “such special arrangements” as may be appropriate to redress the situation.

20. The complainants seek moral damages by reference to the delay in considering their promotion and the irregularities in the Appeal Board proceedings. There is nothing to suggest that the irregularities in the appeal proceedings, if any, resulted in any prejudice to the complainants. Accordingly, moral damages will not be awarded on that account. However, the position is different in relation to the delay in considering the complainants’ promotion. They contend that the delay was referable to the fact that the Classification Committee did not meet between 2001 and 2006 and that there were interruptions in the work of the Promotion Advisory Board in 2004, 2005 and 2006. This is not denied by WIPO. However, it contends that there was no inordinate delay between the supervisors’ recommendations and the promotion eventually granted to the complainants. According to the Organization, the delay in relation to the first complainant was two years and six months, and in relation to the second, third and fourth, one year and nine months, two years and two years and seven months, respectively. The delays were significant and WIPO has offered no explanation for them. Moreover, and in light of the finding that there was a practice of considering accelerated promotion before persons promoted from the General Service category suffered financial disadvantage, the argument that there was no specific timeline must be rejected. So, too, must the argument that the complainants “were not promoted to [grade] P-3 until June 2007 because they were not deemed qualified [...] and [...] their posts did not merit reclassification at that time”. The evidence is that no consideration was given to either course until June 2006 and, then, only in relation to the first and fourth complainants when the Promotion Advisory Board referred the first complainant’s case to its next session and considered the fourth complainant’s case by reference to the Guidelines on the Promotion of Staff as promulgated in 2006 and apparently without regard to the undertaking given by the Human Resources Management Department in 2003. In each case,

the delay warrants an award of moral damages in the amount of 15,000 Swiss francs.

21. As already indicated, the decisions not to grant retroactive effect to the complainants' promotion must be set aside. In the case of the first, second and third complainants, the matters must be remitted for reconsideration on the basis that each promotion should be made retroactive to the earliest date on which it would have been granted in accordance with the Guidelines set out in Office Instruction No. 12/1998 if the supervisors' recommendations had been considered within three months of receipt and, if promotion would not then have been granted, on the basis that the recommendations would have been considered at six-monthly intervals. In the case of the fourth complainant, the matter is remitted for reconsideration on the basis that her promotion should be made retroactive to the earliest date on which she would have been promoted had her case been considered in April 2004 and, if she would not then have been promoted, on the basis that her case would also have been considered at six-monthly intervals.

22. The claims for a refund of the deductions from the personal transitional allowance must fail. However, it is within the scope of that claim to order that, if reconsideration of the effective dates of promotion does not result in a situation in which no complainant was at any stage in receipt of a lower remuneration than she would have received had she not been promoted, some special arrangement must be made to remedy that situation. It will be ordered accordingly.

23. The complainants are each entitled to their costs in the amount of 1,500 francs.

## DECISION

For the above reasons,

1. The Director General's decisions to deny retroactive effect to the promotion to grade P-3 granted to the complainants are set aside, as are his decisions to deny a correction to their personal transitional allowances.

2. The matters relating to Ms D., Ms L. and Ms M. are remitted to the Director General for reconsideration on the basis that each promotion should be made retroactive to the date on which it would have been granted in accordance with the Guidelines on Promotion of Staff issued in Office Instruction No. 12/1998, if their supervisors' recommendations had been considered within three months of receipt and, if promotion would not then have been granted, on the basis that the recommendations would have been considered at six-monthly intervals.
3. The matter relating to Ms P. is remitted to the Director General for reconsideration on the basis that her promotion should be made retroactive to the earliest date on which it would have been granted in accordance with the Guidelines on Promotion of Staff set out in Office Instruction No. 12/1998, had her promotion been considered in April 2004 and, if she would not then have been promoted, on the basis that her promotion would have been considered at six-monthly intervals.
4. WIPO shall make such special arrangements as are appropriate to ensure that none of the complainants was at any stage in receipt of a lower salary than she would have received had she not been promoted from the General Service category to the Professional category, unless reconsideration of the effective dates of their promotion in accordance with points 2 and 3 above renders that unnecessary.
5. The Organization shall pay each of the complainants 15,000 Swiss francs by way of moral damages and 1,500 francs by way of costs.
6. The complaints are otherwise dismissed.

In witness of this judgment, adopted on 30 October 2008, Mr Seydou Ba, President of the Tribunal, Ms Mary G. Gaudron, Vice-President, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 February 2009.

Seydou Ba  
Mary G. Gaudron  
Dolores M. Hansen  
Catherine Comtet